

In the United States Court of Federal Claims

Nos. 18-204C, 18-206C, 18-207C, 18-208C, 18-211C, 18-214C, 18-216C, 18-220C,
18-229C, 18-238C, 18-239C, 18-245C, 18-246C, 18-248C, 18-251C, 18-252C, 18-261C,
18-275C, 18-328C
(consolidated)

(Filed: March 23, 2018)

***** *

FMS INVESTMENT CORP., *et al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant,

and

PERFORMANT RECOVERY, INC., *et al.*,

Defendant-Intervenors.

***** *

Post-Award Bid Protest;
Department of Education Loan
Collections; Motion to Supplement
the Administrative Record; Motion
to Disqualify Counsel.

David R. Johnson, with whom was *Tyler E. Robinson*, Vinson & Elkins LLP, Washington, D.C., for Plaintiff FMS Investment Corp.

Jonathan S. Aronie, with whom was *Townsend L. Bourne*, Sheppard Mullin Richter & Hampton LLP, Washington, D.C., for Plaintiff Account Control Technology, Inc.

Paul A. Debolt, with whom were *Chelsea B. Knudson*, *Michael T. Francel*, and *James Y. Boland*, Venable LLP, Washington, D.C. and *Tysons Corner*, Virginia, for Plaintiff Transworld Systems, Inc.

William M. Jack, with whom were *William C. MacLeod*, *David E. Frulla*, and *Amba M. Datta*, Kelley Drye & Warren LLP, Washington, D.C., for Plaintiff GC Services Limited Partnership.

Thomas P. McLish, with whom was *Scott M. Heimberg*, Akin Gump Strauss Hauer & Feld LLP, Washington, D.C., for Plaintiff Texas Guaranteed Student Loan Corp.

Jeffery M. Chiow, with whom were *Neil H. O'Donnell*, *Lucas T. Hanback*, and *Stephen L. Bacon*, Rogers Joseph O'Donnell, Washington, D.C., for Plaintiff The CBE Group, Inc.

Jonathan D. Shaffer, with whom were *Mary Pat Buckenmeyer* and *Sean K. Griffin*, Smith Pachter McWhorter LLC, Tysons Corner, Virginia, for Plaintiff Pioneer Credit Recovery, Inc.

Thomas A. Coulter, O'Hagan Meyer PLLC, Richmond, Virginia, for Plaintiff Progressive Financial Services, Inc.

Megan C. Connor, with whom were *Julia Di Vito*, *Matthew E. Feinberg*, and *Kathryn M. Kelley*, PilieroMazza PLLC, Washington, D.C., for Plaintiff Coast Professional, Inc.

Lawrence S. Sher, with whom were *Lawrence P. Block* and *Elizabeth Leavy*, Reed Smith LLP, Washington, D.C., for Plaintiff Central Credit Services, LLC.

John R. Tolle, Baker, Cronogue, Tolle, & Werfel, LLP, McLean, Virginia, for Plaintiff Delta Management Associates, Inc.

Michael A. Richard, with whom were *Michael H. Payne* and *Jacqueline J. Ryan*, Cohen, Seglias, Pallas, Greenhall & Furman, P.C., Philadelphia, Pennsylvania, for Plaintiff Gatestone & Co. International, Inc.

Todd J. Canni, with whom were *Richard B. Oliver*, *J. Matthew Carter*, *Aaron S. Ralph*, *Alexander B. Ginsberg*, and *Meghan D. Doherty*, Pillsbury Winthrop Shaw Pittman LLP, Los Angeles, California, for Plaintiff Continental Service Group, Inc.

Robert K. Tompkins, with whom were *Mary Beth Bosco*, *Rodney M. Perry*, *Lelia George-Wheeler*, and *Gordon N. Griffin*, Holland & Knight LLP, Washington, D.C., for Plaintiff Immediate Credit Recovery, Inc.

Stuart B. Nibley, with whom were *Amy M. Conant*, *Erica L. Bakies*, and *Jenna M. Lorence*, K&L Gates LLP, Washington, D.C., for Plaintiff Allied Interstate LLC.

John R. Prairie, with whom were *Brian G. Walsh* and *Cara L. Lasley*, Wiley Rein LLP, Washington, D.C., for Plaintiff Automated Collection Services, Inc.

Joseph J. Petrillo, with whom was *Karen D. Powell*, Petrillo & Powell, PLLC, Washington, D.C., for Plaintiff Collecto, Inc. d/b/a EOS CCA.

Holly A. Roth, with whom was *Thomas Folk*, Reed Smith LLP, McLean, Virginia, for Plaintiff Williams & Fudge, Inc.

James C. Fontana, with whom were *Jeffry R. Cook* and *James C. D'Agostino*, Dempsey Fontana, PLLC, Tysons Corner, Virginia, for Plaintiff Value Recovery Holdings, LLC.

David R. Pehlke, with whom were *Chad A. Readler*, Acting Assistant Attorney General, *Robert E. Kirschman, Jr.*, Director, *Patricia M. McCarthy*, Assistant Director, Civil Division, U.S. Department of Justice, Washington, D.C., as well as *Jose Otero* and *Sarah Falk*, General Attorneys, Office of the General Counsel, U.S. Department of Education, for Defendant.

Michael McGill, with whom were *Thomas L. McGovern III*, *Christine Reynolds*, and *Thomas A. Pettit*, Hogan Lovells US LLP, Washington, D.C., for Defendant-Intervenor Performant Recovery, Inc.

David T. Ralston, Jr., with whom were *Frank S. Murray*, *Micah T. Zomer*, and *Krista Nunez*, Foley & Lardner LLP, Washington, D.C., for Defendant-Intervenor Windham Professionals, Inc.

ORDER

WHEELER, Judge.

On March 23, 2018, the Court held a status conference in the above-captioned consolidated bid protest to discuss (1) the Government's notice that the Department of Education ("ED") is unlikely to proceed with continued litigation in this matter, Dkt. No. 149; (2) Plaintiffs' motions to supplement the administrative record ("AR"); and (3) Defendant-Intervenor Performant Recovery, Inc.'s ("Performant") motion to disqualify Pillsbury Winthrop Shaw Pittman LLP ("Pillsbury") as counsel for Plaintiff Continental Service Group, Inc. ("ConServe"), Dkt. No. 110. As discussed during the status conference, the Government shall produce the following sets of documents to Plaintiffs:

1. Full evaluation records underlying the December 2016 award decision for all current protestors and awardees, including but not limited to complete 2016 evaluations, full 2016 proposals, the Memorandum of Law submitted to GAO, and the Contracting Officer's statement of facts submitted to GAO;

2. All documents related to the 2015 Focused Review of all current protestors and the two awardees;
3. All documents related to monthly call monitoring reviews for all ATE contractors since 2015;
4. All documents (including non-privileged agency communications) related to the appearance of a conflict of interest between Secretary of Education Betsy Devos and Performant;
5. All documents (including non-privileged agency communications) related to ED officials attempting to influence the award decision; and
6. All documentation of communications between ED evaluators, “points of contact,” and “clients” identified in the past performance evaluation documents.

The Court notes that these documents need not be filed with the Court and will not be supplemented to the AR. Plaintiffs are free to utilize and attach any relevant documents from this production to any future briefs filed in this matter. All other requests in Plaintiffs’ motions (Dkt. Nos. 133, 135, 136, 137, 138, 141, 142, 145, 148, and 150) are DENIED. The Government shall file a notice with the Court indicating when it is able to produce the above documents to Plaintiffs on or before Wednesday, March 28, 2018. Further, the Government is ordered to file a notice with the Court informing the parties of ED’s timeline for announcing its final decision on how it plans to proceed in this litigation on or before Wednesday, April 11, 2018. The MJAR briefing schedule for all parties in this matter shall remain suspended.

Lastly, Performant’s motion to disqualify (Dkt. No. 110) is GRANTED. Pillsbury is disqualified as counsel for ConServe in this matter effective immediately. The Court will issue a more substantive opinion on this issue in the coming days.

IT IS SO ORDERED.

s/ Thomas C. Wheeler
THOMAS C. WHEELER
Judge